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THE SUSTAINABLE USE OF BIOLOGICAL RESOURCES: SYSTEMS AND NATIONAL EXPERIENCES FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE, INNOVATIONS AND PRACTICES

Note by the UNCTAD secretariat

I. Introduction

1. The protection of knowledge, innovations and practices of indigenous and local communities (hereafter referred to as "traditional knowledge", TK) has been receiving increasing attention on the international agenda in recent years. This is due to several factors. First, it has been recognized that TK plays a key role in the preservation and sustainable use of biodiversity. Second, many activities and products based on TK are important sources of income, food, and healthcare for large parts of the populations in many developing countries, including the least developed countries (LDCs). However, TK is being rapidly lost as local ecosystems are degraded and traditional communities are integrated into the wider society. Third, concerns have been raised about how the benefits derived from the use of biodiversity and associated TK are appropriated and shared. Fourth, while the need to protect TK and to secure fair and equitable sharing derived from the use of biodiversity and associated TK has been fully recognized, for example in the Convention on Biological Diversity, there is no agreement on what would be the most appropriate and effective ways to achieve these objectives. Fifth, the long term sustainable economic development of many indigenous and local communities may depend on their ability to harness their TK for commercial benefit, which in turn requires its protection.

2. In the Plan of Action adopted at UNCTAD's tenth Conference in February 2000, member States decided to address the protection of TK as part of UNCTAD's work in the area of trade and environment by "taking into account the objectives and provisions of the Convention on Biological

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Diversity and the TRIPS Agreement, studying ways to protect traditional knowledge, innovations and practices of local and indigenous communities".

3. In response to this mandate, the Expert Meeting on Systems and National Experiences for Protecting Traditional Knowledge, Innovations and Practices was held in Geneva from 30 October to 1 November 2000. The Expert Meeting was prepared in close co-operation with the secretariats of other intergovernmental organizations, in particular of the Convention on Biological Diversity (CBD) and the World Intellectual Property Organization (WIPO). Issues for discussion were outlined in the background note prepared by the secretariat (TD/B/COM.1/EM.13/2). Over 250 experts from some 80 countries attended this meeting. Participants included policymakers, representatives of indigenous communities, non-governmental organizations, academics, the business community, and international organizations. A wealth of information was presented at the meeting, including over 50 papers submitted by experts. The experts adopted an outcome reflecting the diversity of views expressed and summarizing their conclusions and recommendations (TD/B/COM.1/EM.13/L.1). At the request of a WTO member, the outcome was distributed at the Committee on Trade and Environment and the TRIPS Council.

4. The Commission's task is to turn that outcome into agreed conclusions and recommendations for policy action at the national and international level, including for UNCTAD. This document attempts to facilitate that task by highlighting important areas for policy action that emerged from the Expert Meeting's discussions and outcome. In addition, the secretariat issued a communication, dated 20 November 2000, inviting comments on the outcome of the meeting, in particular in the following areas:

- Elements of the outcome that would require follow-up actions by the Commission;
- General proposals on activities to implement the experts' recommendations;
- Identifying areas for designing or strengthening technical cooperation programmes to address specific capacity-building needs arising from the outcome;
- Highlighting areas of co-operation with other intergovernmental organizations concerning the protection of traditional knowledge.

5. The UNCTAD secretariat has received ample oral feedback on the outcome of the Expert Meeting, welcoming in particular the richness of the debate of experts and the recommendations on capacity-building assistance by international organizations with a stronger regional focus. However, at the time of drafting this document, formal comments had been received in response to the above-mentioned communication.

II. Possible policy action at the national level

6. TK plays a valuable role in several sectors, including traditional medicine, traditional agriculture and handicrafts. However, it is often undervalued and underutilized, and is currently being lost. Consequently, the Experts called for "raising awareness of the role and value of TK among local and indigenous communities (LICs), policy makers and other stakeholders" (paragraph 33 of TD/B/COM.1/EM.13/L.1)[1]. Governments, international organizations and other stakeholders can be actively involved in awareness raising activities. These could include training programmes, consultative meetings, publications, and media campaigns.

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[1] All quotes in the remainder of the text refer to the same document.

7. In developing policies and programmes aimed at protecting TK, the experts stressed the importance of fully involving LICs, particularly the women in those communities, who are primary custodians and transmitters of TK to future generations.

8. The protection and preservation of traditional knowledge is inextricably linked to the preservation of the local and indigenous communities that are the holders of TK as well as to the conservation of the natural habitats of these communities. Thus, policy makers should be aware that any action that enhances the cultural identity and survival of LICs, also contributes to preserving TK and biodiversity. Governments might wish to take stock of policies affecting LICs and biodiversity in this light.

9. TK is not static, but rather constantly evolving in response to changing conditions. Experts held that "TK communities need to ensure that their innovations systems need to be supported and rewarded and that they are not locked out of the research agenda by major companies and countries". There is a need for more research in TK and benefits can be gained from cross-fertilization between TK and other types of knowledge systems. In particular, experts believed that "possibilities of interaction between traditional and modern medicine should be carefully studied, and there is a need for more research on the effective use of traditional medicine, in particular with universities, polyclinics and hospitals." Governments could play an important role in promoting and financing such research and disseminating the findings both nationally and internationally.

Systems for the protection of TK

10. Within LICs, access to and use of TK is governed by diverse systems of customary laws. However, these are usually non-binding beyond the community. Many experts suggested a pluralistic legal approach to the protection of TK, combining increased recognition of customary law with other suitable instruments in national legislation. An exchange of experiences among countries where progress has been made in this area could be useful. The Commission might wish to recommend that Governments examine how customary laws of LICs in their countries could be strengthened.

11. Experts expressed divergent views about the extent to which the current intellectual property rights (IPR) regime could protect TK. Some thought IPRs could be used in certain cases. Others held that the current IPR regime is inappropriate for the protection of TK systems because of the inherent conflict between the two systems. Moreover, concern was expressed that most traditional communities did not have the resources to file patents and other IPR applications or to take legal action to prevent improper granting of patents (e.g. an invention that is not new being awarded a patent due to inadequate information). Experts also expressed the view that "[T]here is a need to explore an international framework for collective rights within the universe of IPRs, possibly including in WIPO, WTO and CBD" (paragraph 19 of the outcome).

12. Several governments made proposals on linking IPRs and TK, for instance through certificates of origin or disclosure clauses in patent applications or, as in the Andean Decision 406, by linking the approval of TK-based patents to the presentation of a contract for licensing, as outlined in paragraph 17 of the outcome.

13. At the Expert Meeting, TK holders and others expressed the view that "patenting of life forms should be banned because it attacks the values and the livelihoods of LICs".

14. A good number of experts pointed out that current IPR regimes could not adequately protect all types of TK. It was therefore recommended that "apart from using suitable modern IPR instruments for appropriate cases, a national *sui generis* system for the protection of TK may be useful." The term *sui generis* means "one of a kind" or "of its own kind" and in this case could encompass a constellation of policies, procedures and programmes specifically designed to protect TK. Experts recommended that "such a *sui generis* system could include the following common elements: collectively held TK-rights; registers of knowledge; clear systems of access to such rights and benefit-sharing; clarification of land resource rights as part of the holding of TK rights; wide participation and consultation; and creation of effective incentives for research" (paragraph 34 of the outcome). Codes of conduct can also be incorporated.

15. There are several model *sui generis* systems which could be useful starting points, including that of the Organization of African Unity. Also, some countries have drafted *sui generis* legislation, notably Peru and Panama. The Commission might wish to recommend that interested governments take a proactive approach to developing national *sui generis* legislation in their countries, learning from the experiences of other developing countries.

16. Access and benefit sharing (ABS) legislation and regulations are an integral part of national systems to protect TK. Prior Informed Consent (PIC) is one of the pillars of ABS. Currently, over 50 countries are drafting ABS legislation, primarily to govern access to their genetic resources. Only some of them extend the principle of PIC to the community level. The Commission might wish to recommend that access to genetic resources on the territory of LICs and associated TK be obtained with the PIC of the TK-holding community and in compliance with the community's customary laws to ensure appropriate involvement in decision making and benefit sharing. In the case where several communities hold the same knowledge, the government could consider setting up a community knowledge fund with low overheads to collect and distribute benefits.

17. Registries of TK can also be important, whether or not as an element of *sui generis* systems. These can help preserve TK. They can also help prevent improper granting of patents by proving prior art. However, consideration needs to be given to the forms of accessibility to registries, since making TK more readily available could facilitate its use without proper acknowledgement or compensation. Experts emphasized that governments could play an important role in coordinating and promoting grassroots efforts to document TK and could, for example, encourage a common format and help disseminate the information to patent offices worldwide to facilitate the screening of prior art in TK-based patent applications.

18. Experts emphasized that national policy coordination was important for TK protection and development. Without such coordination, policies and programmes originating in different government departments could have conflicting impacts and even work in opposite directions. This could be particularly true with complex issues such as TK protection. Therefore, the experts recommended that, in addition to developing a *sui generis* system as described above, "TK protection needs to be reflected in other national policy areas, such as agriculture, forestry, investment and finance." For example, governments might wish to be sure that their forestry policies allow the indigenous groups living in the forests to maintain their traditional lifestyle. "Agricultural extension services and the direction of R&D in developing countries should take account of TK" (paragraph 13 of the outcome). Governments might wish to set up multi-stakeholder processes to examine and coordinate action on this issue.

Harnessing TK for development and trade

19. Experts provided numerous examples on the contribution of TK to the development process. This concerned, *inter alia*, enhanced agricultural production; increasing value of education systems; improving the quality of health care and contribution to good governance (e.g. local institutions often play a vital role in improving post-conflict situations). It was therefore underscored that empowerment and enabling of LICs was a key to integrating TK into the development process.

20. The Commission might wish to recommend to governments to include a number of measures into national strategies on harnessing TK for the development process. This can include the institutional consolidation of indigenous organizations; facilitation of building of partnerships between LICs and authorities, researchers and experts; promotion of the intercultural exchange of experience; building of traditional knowledge networks; integrating TK in development programs/plans, including the provision of sufficient funding support; and facilitating dialogue with development partners. "The key role of development partners is to empower communities to use global and local knowledge", supported by capacity building. In addition, there is a need to explore how modern communication technologies can be used by LICs to share information.

21. In commercializing TK-based products, experts cautioned against over-exploiting the resource base of LICs. The Commission might wish to suggest that governments should bear this in mind when considering or taking measures to harness TK for development and trade.

22. Experts highlighted that governments can assist, both at national and international level, the commercialization of TK by interested LICs. Since LICs tend to be relatively small, they usually cannot on their own generate the economies of scale that are in particular necessary for entering the international market. Thus the facilitation of partnerships, for instance through the use of modern IT instruments, is very important. Standardization and quality control for TK-derived products and services were also considered important, in particular for traditional medicine and herbal products. Governments could also assist in creating new markets and market niches for TK-based products, for instance for vegetable dyes. Experts also saw merit in supporting the application of modern designs to traditional materials and crafts in promoting their trade.

Capacity building

23. Experts recommended that training and consultative programmes among LICs be carried out at the national level. These could include the following areas:

- awareness-raising on the importance of TK for national and global development;
- raising awareness among TK-holders, including the creators of traditional folk culture, of their rights in the area of intellectual property;
- strengthening and application of customary law;
- exploring ways to implement and enforce national legislation for the protection of TK as well as ABS legislation once it has been enacted;
- training in sustainable harvesting techniques;
- negotiating access and benefit sharing contracts;
- institutional consolidation of LICs;
- promoting the creation of networks of traditional practitioners and community-to-community exchanges to better disseminate good practices based on TK;

- facilitating policy dialogue between LICs and policy makers;
- documentation of traditional knowledge;
- converting TK into economically viable products and services.

24. The Commission might wish to make recommendations on which types of training are of highest priority and who should carry them out, e.g. governments, international organizations, NGOs, universities, etc. It may also wish to emphasize that women in LICs be target beneficiaries of such training. It may also wish to make recommendations on topics where capacity-building would best take place at the regional or international level, in addition to local and national. The capacity-building programmes should differentiate the objectives of each region and build a regional dialogue which can be self sustaining.

III. Possible policy action at the international level

25. Experts were of the view that national *sui generis* systems alone will not be sufficient to protect TK adequately. Exclusion from patentability of TK-based products in one country, for instance, would not prevent others from granting patents. The experts therefore recommended the exploration of "minimum standards of an international *sui generis* system for TK protection", with the full involvement of LICs (paragraph 40 of the outcome). In a communication received from a Member State following the Meeting it was argued that such a mechanism should also take into account IPR systems used by companies to protect further developments of TK.

26. The Commission might consider calling for the exploration and development of an international framework for *sui generis* protection of TK.

27. Views varied on the best forum for such a system/framework. The WTO TRIPS Agreement is silent on the protection of TK. Several experts argued that TK should be included in the TRIPS Agreement so as to prevent its misappropriation internationally. Reference was also made to proposals in this regard (African Group, several countries in Latin America and India) that had been submitted in preparation of the Seattle Ministerial Conference. Experts recommended that "[I]n addition to other fora, TK should also be discussed in the WTO" (paragraph 37 of the Outcome of the Meeting).

28. In the meeting's discussions it emerged that approaches to the protection and use of TK in several respects seem to be different in Latin America, Asia and Africa. This could call for a greater focus on regional capacity-building activities and policy dialogues. Policy-makers might wish to hold regional consultations on a regular basis to discuss these issues and find common solutions.

29. Since the protection of TK is such a multi-faceted issue, many institutions are working on it. Experts suggested that "an impartial working group could be created to coordinate these efforts." In addition, indigenous groups at the meeting called for the establishment of an Indigenous Peoples Working Group for Protecting TK or LICs, with funding from the international community. The Commission may wish to consider the merit of establishing these groups and, if appropriate, make recommendations on modalities.

IV. Recommendations to UNCTAD

30. Experts made several recommendations for further work by UNCTAD (paragraph 41). The most relevant are:

(a) Regional approach to further work on the protection of TK

31. Experts recommended that in its further work on the protection of TK UNCTAD should pay attention to regional aspects, for example by organizing workshops and seminars at the regional level. Besides intra-regional exchange of national experience on TK protection and development, one could also explore the possibility of building regional systems of protection, regional trademarks and other such schemes. Taking into account the recommendations by the experts, the Commission may wish to recommend specific capacity-building activities to be designed and implemented in cooperation with the CBD, WIPO, the World Bank and other relevant institutions, building on the existing programmes mentioned under (c) below.

(b) Sui generis systems and multilateral aspects thereof

32. Experts recommended that UNCTAD "assist interested developing countries in exploring *sui generis* systems for the protection of TK, including possible multilateral aspects of such systems". The Commission's deliberations may provide an opportunity for interested developing countries to comment on their specific capacity-building needs in this area.

(c) Strengthening capacity-building programmes on TK

33. Experts recommended that UNCTAD strengthen capacity-building programmes on TK, including within the framework of the BIOTRADE Initiative, the UNEP-UNCTAD Capacity Building Task Force (CBTF) on Trade, Environment and Development and ongoing (India, Viet Nam) and planned UNDP/UNCTAD projects. It was also recommended to further develop the TrainforTrade 2000 module on Traditional Knowledge, Trade and Development.

34. At the Expert Meeting and in subsequent events, the secretariat has received several expressions of interest in joint capacity-building activities. For example, the outcome of the Expert Meeting was discussed at the Meeting of African Trade Negotiators on selected WTO issues, held in Mauritius, 4-8 December 2000, and recommendations were made for regional capacity-building activities, in co-operation between the Organization for African Unity and UNCTAD. Similarly, the WHO Inter-regional Workshop on Intellectual Property Rights in the Context of Traditional Medicine, held in Bangkok on 6-8 December 2000, recommended that "WHO in cooperation with other agencies, including UNCTAD, needs to support the initiatives taken by respective governments of Member States for capacity building, implementation and enforcing the legislation to protect and promote traditional medicine knowledge through training, seminars and workshops. International cooperation should be increased in this area". The Commission may wish to explore further avenues of cooperation, including within existing programmes.

(d) Contributing to ongoing processes in CBD, UNCCD, WHO, WIPO and WTO

35. In their interventions and information notes, WIPO and CBD emphasized the contribution UNCTAD could make to the work of the recently created WIPO Intergovernmental Committee on

Intellectual Property Rights, Genetic Resources and Traditional Knowledge as well as the CBD Working Group on the Implementation of Article 8(j) and Related Provisions. UNCCD proposed close cooperation with UNCTAD, if appropriate through a Memorandum of Understanding. The Commission may wish to give recommendations concerning UNCTAD's contribution to ongoing work in CBD, UNCCD, WHO, WIPO, WTO and other organizations.

(e) Harnessing TK for Development and Trade

36. The Experts emphasized that TK is often an underutilized resource in the development process and that there is a need for awareness-raising and for "the design and implementation of comprehensive national strategies to harness TK for development and trade". The Commission may wish to recommend that these issues be taken into account *inter alia* in the context of the LDC-III Conference.

37. UNCTAD could also explore the possibility of developing trademarks and other forms of labeling which could facilitate the creation of niche markets for such products.

(f) Publication

38. The Experts recommended publishing, including on the Internet, the papers submitted to the Expert Meeting. The Commission may wish to endorse this recommendation and take decisions on its implementation.